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IN THE

Supreme Court of the United States

OCTOBER TERM—1946

No. 342

DANIEL BIRMELI DINGMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY OF PETITIONER TO BRIEF IN OPPOSITION

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The very clear and able brief in opposition would seem to make the strongest possible showing in support of the Government's position that even though petitioner was a conscientious objector *not inducted into the Armed Services* for training and service, *but assigned to work of national importance under civilian direction,* his term of service was, nevertheless, validly extended beyond the twelve month period of assignment provided by Section 3(b) of the Selective Training and Service Act of 1940, under the authority conferred by the Extension of Service Acts of August 18 and December 13, 1941.*

This showing, strong as it is, however, ignores the following considerations which would seem conclusive against the Government's position:

*These Acts are, respectively, the Service Extension Act of August 18, 1941, (50 U. S. C. APP. Sec. 351, 351); and the Territorial Use of Army and Extension of Service Period Act of December 13, 1941 (50 U. S. C. App. Sec. 731, 732). These will be found respectively at pp. ii and iii of Appendix A to the Petition for Cetriorari.

I.

The brief in opposition states, pp. 10-11:

> "Petitioner's argument is thus based upon an untenable distinction between the applicable statutes. If, as he has no difficulty assuming, Section 3 (b) of the original act applied to limit the required service period of conscientious objectors to twelve months, then the two extension acts of 1941 similarly applied and were authority for the promulgation of Regulation 652.14. If, on the other hand, the extension acts are to be read literally, as petitioner urges, so as not to apply to such persons, Section 3 (b) must be similarly construed. In the latter event, there was no controlling legislative provision and the matter was properly one for the determination of the Director of Selective Service acting in accordance with the general policy laid down by Congress."

In this statement the Government overlooks sound reasons for the distinctions made by the petitioner between the Selective Service Act of 1940 and the two Extension Acts of 1941.

First and foremost; had Congress intended that the Extension of Service Acts of August 18 and December 13, 1941, should apply to conscientious objectors not inducted into the Armed Services but assigned to work of national importance, Congress could readily have expressly so provided and, it would be reasonable to assume, would have done so. Such conscientious objectors, however, are not even mentioned in either of those Acts. Moreover, in both those Acts Congress has used meticulously precise language, not only expressly limiting the extension periods provided by

those Acts to person *inducted* into the Armed Services, but even as to such persons, only to those "now or hereafter in or subject *to active military service.*" Obviously, this language necessarily excludes even conscientious objectors *inducted* into the Armed Services, not to speak of those who, like petitioner, were *not so inducted,* but were *merely assigned* to work of national importance.*

Second; while Section 3(b) of the 1940 Act does not in express terms apply to conscientious objectors assigned to work of national importance, it seems necessary to construe that Section as intended so to apply. The alternative would be to assume that the Act was intended to penalize such conscientious objectors by condemning them to indeterminate service, the length of which would be limited only by the will of the President. Such construction of the Act would be not only of doubtful constitutionality, but it would attribute to Congress a vindictive instead of a tolerant and constitutional attitude toward conscientious objectors. It moreover, would conflict with the administrative construction put by the Director of Selective Service on the Act, as shown in his First Report, quoted p. 9 of the Brief in Opposition. There the Director stated:

> "It was felt that assignees should be neither favored, nor punished because of their beliefs, but as far as the law allowed, they should undergo the same inconveniences and receive the same benefits as the men in the Services."

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*The suggestion at page 6 of the petition for certiorari that conscientious objectors *inducted* for non-combatant training and service may possibly be subject to the extension periods provided by the Extension Acts of August 18 and December 13, 1941, seems on further consideration to be unwarranted.

In other words, Section 3(b) cannot be read literally without unreasonable and possibly unconstitutional results. Therefore, even though the language of that Section does not expressly include conscientious objectors not inducted into the Armed Forces, it must be construed as intended to include them, because they are not expressly excluded, and because an intent to exclude them could not reasonably be imputed to Congress unless Congress had used language expressly doing so. On the other hand, the Extension Acts of August 18 and December 13, 1941 can be read literally without unreasonable or unconstitutional results. Congress might very well have come to realize that the vast majority of conscientious objectors were conscientiously opposed even to participation in non-combatant service, and that in reality no work of national importance could or had been found for more than a very small minority of such conscientious objectors. To extend the term of service of such conscientious objectors beyond the twelve month period provided by Section 3(b) of the 1940 Act, therefore, would serve no useful purpose, and would merely result in the unwarranted expense of providing personnel and camps for their continued control and maintenance. Furthermore, it cannot be pretended that the meticulously precise language of the Extension Act expressly includes any conscientious objectors. On the contrary, by its very terms, that language necessarily excludes conscientious objectors of any category. Therefore, there is no reason for not reading such language literally, or for attempting to construe it to include conscientious objectors when, by such precise terms, it necessarily excludes them.

II.

The brief in opposition states, p. 9:

> "It is significant that in several successive sessions after the promulgation of this Regulation (652.14) Congress appropriated funds for the operation and management of the civilian public service camps without questioning its propriety. See, e.g., 50 U. S. C. App., Supp. V, 309a."

While it is notorious that civilian camps for conscientious objectors have been mainly supported by private organizations, largely religious, petitioner assumes the accuracy of the statement that Congress has made some appropriations for the operation and management of such camps. However, even though such appropriations have been made since the promulgation of Selective Service Regulation 652.14, such appropriations have not the signficance the Government would ascribe to them, i.e., that thus Congress gave legislative affirmance to the administrative construction put by the Director of Selective Service on the Extension Acts of August 18 and December 13, 1941, as including conscientious objectors assigned to such camps for work of national importance.

Irrespective of the enactment of such Extension Acts, Congress knew that new conscientious objectors would become subject to assignment to work of national importance for the twelve month period provided by the 1940 Act, since, assuming Congress did not intend such Extension Acts to apply to conscientious objectors, those Acts would not affect the continuing application to them of the provisions of the 1940 Act. Therefore, civilian public service camps would continue to be necessary for such new conscientious objec-

tors, even if assignees who had already served the specified twelve month period were discharged as such period should expire. The fact, therefore, that Congress continued to make appropriations for such camps after the promulgation of Regulation 652.14, carries no necessary or reasonable implication that Congress thereby meant to confirm a construction put by that Regulation on such Extension Acts, contrary to the very precise language which Congress itself had used in those Acts. On the contrary, the reasonable implication is that Congress intended such appropriations for the control and at least partial maintenance of new conscientious objectors assigned to such camps under the provisions of Section 3(b) of the 1940 Act, which provisions Congress obviously has intended should continue to apply to them, because as to them, such provisions were not intended to be changed by the Extension Acts.

III.

At page 11 of the Brief in opposition, it is stated:

> "That policy, as we have already noted, was followed in the promulgation of the Regulation, and it has likewise been followed in respect of the release of conscientious objectors."

Presumably, the policy referred to is that stated in the quotation at page 9 of the brief from the First Report of the Director of Selected Service, which reads as follows:

> "In keeping with the original Selective Service Act, it was expected that assignees would serve one year in camp and then be released. However, congressional action extended the term of service for men in the Army. It was interpreted to apply to as-

> signees as well, so that their term of duty was increased to 18 months. Similarly, when the Army released men over 28 years old, the Camp Operations Division did the same. The general rule has been to follow Army policy in matters of this kind as closely as possible, not because the assignees were considered to have a military status, but with the idea of making the conditions of their service comparable wherever this could be done. It was felt that assignees should be neither favored, nor punished because of their beliefs, but as far as the law allowed, they should undergo the same inconveniences and receive the same benefits as the men in service."

In support of this statement of the Director of Selective Service, it is notable that all the Government is able to instance is what is stated in the footnote to page 11 of the brief in opposition, where it is said:

> The Camp Operations Division of the Selective Service System has adopted a plan for the discharge of men from CPS camps similar to that for the demobilization of Army personnel. This plan has been effectuated by a series of directives to all CPS camps and institutions, the first of which was issued on or about October 18, 1945. Each of these directives sets forth the release procedures and qualifications to be employed and each in turn follows the standards for discharge then prevailing for the Army."

Conceding that, as stated in such footnote, the Selective Service system has adopted a plan and issued a series of directives "for the discharge of men from CPS camps, similar to that for the demobilization of men from the Army personnel", petitioner alleges that it is notorious that such directives have not been followed in practice. However this

may be, it is to be noted that the Government does not undertake to deny the allegations at page 9 of the petition for certiorari, that conscientious objectors assigned to work of national importance under civilian direction have been denied military pay and all other rights and privileges which have been accorded to conscientious objectors actually inducted into the land and naval forces of the United States, who receive the pay of members of the Armed Forces and are accorded the re-employment and insurance provisions accorded such forces.

So far, therefore, as the Government's contention that the Extension Acts of August 18 and December 13, 1941, should be held to apply to conscientious objectors not inducted into the Armed Forces but assigned to work of national importance, rests on the alleged uniform application of other provisions of those Acts both to such conscientious objectors and the Armed Forces, that contention seems plainly to be without basis in fact.

CONCLUSION

Petitioner accordingly respectfully submits that in addition to the Reasons for the Allowance of the Writ, set out at pages 7-13 of the petition for certiorari, the Writ should be granted:

1. Because the importance of the question presented extends beyond the validity of petitioner's conviction, not only to the validity of the detention in conscientious objector camps of some 3,000 conscientious objectors who have already completed a full twelve months' service, but to the validity of the conviction and imprisonment of other such conscientious objectors for resistance to such detention.

2. Because, while petitioner believes it has been made abundantly clear that the Extension Acts have no application either to petitioner or to similar conscientious objectors, it has been impossible within the appropriate limits of a petition for certiorari to review the legislative history of those Acts which petitioner believes would further support his contention.

3. Because the importance of the question presented accordingly requires that opportunity should be afforded, not only to petitioner, but to the Government, for a more adequate and exhaustive discussion of that question, and this can be afforded only by issuance of the Writ.

Respectfully submitted,

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